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No. 00-995

IN THE
Supreme Court of the United States

PIZZA HUT, INC.,
Petitioner,

v.

PAPA JOHN'S INTERNATIONAL, INC.;
PAPA JOHN'S USA, INC.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF AMICUS CURIAE OF A GROUP OF LAW AND MARKETING PROFESSORS IN SUPPORT OF PETITIONER

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Gerald J. Thain, Professor of Law, University of Wisconsin Law School, on behalf of himself and as counsel for a group of professors of law and professors of marketing, respectfully requests as *amicus curiae* that the petition in this case be granted.[1] The consent of the attorneys for the petitioner and the attorneys for the respondents has been obtained.

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[1] No counsel for a party has authored this brief in whole or in part and no persons other than amicus curiae have made monetary contributions to preparation or submission of the brief.

INTEREST OF THE AMICI

The interest of the amici in this case arises from their concern that the law governing advertising be applied consistently and in a manner that will provide satisfactory guidance as to the requirements of the law to those who advertise and to those who counsel advertisers and to those officials charged with the regulation of advertising practices. Each member of the group submitting this brief has extensive teaching and research experience in the area of law and marketing.

Gerald J. Thain, Professor of Law, University of Wisconsin Law School, holds a chair in consumer law, is a former director of the Division of National Advertising Regulation of the Federal Trade Commission, has published scholarly articles concerning advertising, and co-authored the portion of "Reducing Tobacco Use," the Surgeon General's 2000 Report on Smoking and Health, that deals with the marketing of tobacco products. He has been a frequent witness and consultant for the State of Wisconsin Department of Justice and for advertisers.

Ivan L. Preston, Professor Emeritus of Advertising, University of Wisconsin, has written scholarly articles and books concerning advertising and law. He has been a witness and consultant for the Federal Trade Commission, state consumer protection agencies and advertisers.

Mary Dee Pridgen, Professor of Law at the University of Wyoming Law School, is the author of Consumer Protection and the Law, a treatise on consumer protection published by West Group and updated yearly. This book contains chapters on Federal Trade Commission's activities in the areas of unfair and deceptive trade practices, including advertising regulation, and also contains chapters on state unfair and deceptive trade practices acts. She is also the co-author of a law school text

book published by West entitled Consumer Law: Cases and Materials (2d ed. 1991) (with Spanogle, Rohner & Rasor). This text covers the law of deceptive advertising among other topics. Prior to her academic career, she was an attorney at the Federal Trade Commission.

Herbert Rotfeld, Professor of Marketing at Auburn University, has written many articles in marketing and communications journals on issues of advertising regulation and self-regulation, with several specifically focused on issues of advertising puffery. In 2000, he was awarded the American Academy of Advertising's Outstanding Contribution to Research Award for this body of academic work.

THE DECISION BELOW

In the instant case, the United States Court of Appeals for the Fifth Circuit held that representations that an advertised product contained "Better ingredients. Better pizza" were not "material" and therefore not false advertising. It was also held that this slogan was non-actionable "puffery." Amici believe that the decision of the Court of Appeals for the Fifth Circuit was erroneous but, more importantly, that the decision is inconsistent with their understanding of the law governing advertising and is likely to have a significant and substantial impact on the utilization of advertising claims in the United States. At a minimum, the decision, if unreviewed by this Court, is likely to cause significant confusion as to the proper standards for determining "materiality" and "puffing" among advertisers and those who litigate advertising claims and those in government charged with regulating advertising. Therefore, we urge this Court to grant certiorari.

I. The Decision of the Fifth Circuit Concerning "Materiality" Is in Conflict with Other Decisions and Calls for Resolution to Guide Representatives of Business and Consumers.

The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions holding that materiality is presumed under the circumstances present here. Our understanding of the law, prior to issuance of the decision below, was that an advertising claim will be considered a "material" claim if it is a claim that is "likely to influence a purchasing decision."[2] The assertion by Papa John's Pizza that it has "better ingredients" pellucidly is designed to influence the purchasing public to buy their pizzas because their pizzas, if indeed they contained "better ingredients," would undoubtedly be superior to other pizzas in the marketplace and preferred by consumers. A claim that a product has the highest quality or "best" ingredients, in comparison to its competition – and comparisons of that type were made in the advertising at issue in this case – is a claim of comparative superiority. Such claims have consistently been held to be material. *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981). Such claims obviously relate to an "inherent characteristic or quality" of the advertised goods. Thus, in *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841, 855 (2nd Cir. 1977), it was held that it was not material to represent that a paging device that provided updated basketball scores provided those scores "direct from each arena" when in fact they were obtained from television and radio broadcasts. Consumers of this information are concerned with the score and its accuracy and timeliness, not the source of

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[2] This is consistent with this Court's definition of materiality in federal statutes concerning civil and criminal representation under which a misrepresentation is material if it has the capability of influencing the decision-maker to whom the misrepresentation was addressed. *Neder v. United States*, 527 U.S. 1, 16 (1999).

the information, so the representation as to source was not material. Unlike that situation, consumers of pizza surely care about the quality of the ingredients in the foods they consume. It is submitted that it is self-evident that consumers of pizzas or any other food product are interested, indeed seriously interested, in the quality of the ingredients that constitute the product.

The major federal regulator of advertising, the Federal Trade Commission (FTC), presumes the materiality of a claim when an express claim is made or a claim is made relating to the central characteristic of the product in question. We submit that the Fifth Circuit's opinion is inconsistent with the FTC approach because assertions that a product contains "better ingredients" are express claims that relate to the central characteristic of the product in question. Here, the representation that respondents' pizzas were of better quality were not presented solely in words but were accompanied by explicit and vivid pictoral depictions of the tomato sauces and ingredients used by the advertised product, with specific unfavorable comparisons made with the ingredients of competing products.

The decision of the Fifth Circuit, if allowed to stand, would create considerable confusion in the marketing arena for both business and consumers and those who represent them. Under the standards noted above, the claim of "better ingredients" in Papa John's Pizza was a material and specific claim. The specific nature of the claims are especially dramatically indicated in the television advertisements for Papa John's. An example is the advertisement entitled "John presents his college thesis" in which the supposed founder of Papa John's states, accompanied by visual presentation of pizzas in preparation and in final form, that Papa John's uses better sauce and other ingredients that are superior to those used in other pizzas. This is not a situation where an advertiser

indicates its belief that it has a product of generally high quality and urges the consumer to judge for herself or himself that the product is of as high a standard as the advertiser states; instead, it is a specific representation of the quality of the product. Since that representation goes to the very essence of the product, the reliance by the Fifth Circuit to the statement in McCarthy on Trademarks and Unfair Competition, § 27:35 (4th Ed. 1997) that a plaintiff "must make some showing that the defendant's representation was 'material' in the sense that it would have some effect on consumer's purchasing decision" as supporting its decision is misplaced. A representation that a product is superior in measurable ways – which is what is at issue here – constitutes a clear statement of materiality under the McCarthy standard and under the law. The Fifth Circuit's decision to the contrary, if allowed to stand, would encourage more claims of this type, to the detriment of consumers, with an increase of inaccurate or unsubstantiated assertions in the marketplace. At a minimum, there would be considerable uncertainty as to the standards that would be utilized to determine the claims in advertising that are actionable; the decision could have an impact not only on private litigation under the Lanham Act, which has been rapidly increasing in recent years (see Jean W. Burns, "Confused Jurisprudence: False Advertising Under the Lanham Act," 79 B.U.L. Rev. 807, 871 (1999); Bruce P. Keller, "'It Keeps Going and Going and Going': The Expansion of False Advertising Litigation Under the Lanham Act," 59 Law & Contemp. Problems 131, 157 (1996)), but also on public regulation by the Federal Trade Commission and the state counterparts of that agency which are guided, to a significant degree, by the approach of the FTC in matters of consumer protection, including the regulation of advertising. See, e.g., Charles R. McManis, *Unfair Trade Practices in a Nutshell*, 354 (3d ed. 1993).

We urge that certiorari be granted so that a clear and consistent definition of materiality in advertising claims may be obtained and widespread uncertainty in these important arenas of commerce and of public regulation prevented.

II. The Decision of the Fifth Circuit That "Better Ingredients. Better Pizza" Non-actionable "Puffery" Is Erroneous. If Not Reversed, it Will Create Confusion as to What Constitutes Non-actionable "Puffing".

"Puffery" is usually defined as encompassing exaggerations that no reasonable individual would believe and so are not actionable. Prosser and Keeton on Torts define "puffing" as "a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk." Prosser & Keeton, The Law of Torts, 757 (5th ed. 1984). We submit that the determination of the Fifth Circuit that "Better ingredients. Better pizza" constitutes puffery in the context of the use of that slogan in this matter is inconsistent with the standard definitions of "puffery." As noted, *supra*, the claim of superior ingredients clearly goes to the heart of the quality of the product and, as such, cannot be considered a "puff." The context in which the representation was made is not one in which the readers or viewers of the commercials at issue are asked to purchase the advertised product and determine on their own if they agree that the product is "better" than competing products or the "best" product in the marketplace. Such assertions may indeed constitute non-actionable puffery but such assertions are not at issue here. Instead, the assertions are specific and do not fall within the classification of permissible puffing where one's head can be "lied off" without consequence. The statements must be viewed in the context in which they are presented in which the assertion of a "better pizza" is consistently made in

terms of the pizza being better because it has specifically superior ingredients, when compared with competing pizzas.

It is our understanding that non-actionable "puffing" historically has been limited to "those claims that are not capable of objective measurement." This is the definition used by the present Chairman of the Federal Trade Commission, Robert Pitofsky, in Consumer Legislation Symposium, 28 Business Lawyer 294 (1972). These claims are usually statements of opinion, not of fact. See Ivan L. Preston, "Advertising Regulation, Encyclopedia of the Consumer Movement, 2, 4 (1997).

Although the protection afforded advertisers under the puffing rule has been criticized as allowing undue misinformation in the marketplace (see Ivan L. Preston, The Great American Blow-up: Puffery in Advertising and Selling (rev. ed. 1996); Ivan L. Preston, "Puffery and Other 'Loophole' Claims: How the Law's 'Don't Ask, Don't Tell' Policy Condones Fraudulent Falsity in Advertising," 18 Journal of Law and Commerce 49 (1998)), the validity of the general "puffing" defense is not at issue in this case. Instead, the issue is whether the slogan of "Better Ingredients. Better Pizza" constitutes permissible "puffery, when viewed in the context of the advertising campaign of Papa John's Pizza. We believe that it was not "puffing" under the accepted legal definition of that term and that this Court should grant certiorari. Absent review by this Court, there will be considerable uncertainty as to the state of the law concerning permissible puffing among those who advertise and those who counsel or regulate advertisers. Given the important role that advertising plays in our market economy, it is important that such uncertainties and inconsistencies be kept to a minimum. The conflict between the accepted definition of "puffing" and that of the Court of Appeals for the Fifth Circuit in this matter should be resolved,

in the interest of the public as well as the interests of advertisers and regulators.

CONCLUSION

For the reasons set forth above, we believe that the petition for certiorari raises significant questions of law. We respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

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